IN THE

Supreme Court of the United States

October Term, 1915. No. 25.

THE PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

SONMAN SHAFT COAL COMPANY.

In Error to the Supreme Court of the State of Pennsylvania.

Supplemental Brief of Defendant in Error and Rejoinder to Reply Brief of Plaintiff in Error.

SUPPLEMENTAL BRIEF OF DEFENDANT IN ERROR AND REJOINDER TO REPLY BRIEF OF PLAINTIFF IN ERROR

"A"

We assert with confidence that there is no criticism in the reply brief of plaintiff in error, captiously taking to task alleged misstatements in the main brief of defendant in error, which is at all justified by the facts. Both the admissions of the railroad company's witnesses, elicited in part through examination made by its own counsel, and the findings of the jury upon matters submitted to it, justified the comment criticised by the distinguished counsel. The carrier did not condescend below and has not condescended here to offer any excuse for its conduct in refusing to defendant in error cars legitimately ordered by it, when it in fact had cars standing upon its sidings out of service but not out of commission. Neither has it condescended to explain, after its laborious insistence in showing what a plenitude of equipment it possessed, how it came about that the Sonman Company, notwithstanding heroic efforts, succeeded in getting the use of only a small fraction of its rating in that kind of equipment; but that when it made outside arrangements to use Berwind and Keystone cars in which it was compelled to ship its product below the market, the car supply reached it with unparalleled regularity and smoothness, and in much greater volume.

By resorting to the oft adopted device of wrenching a sentence from its context plaintiff in error in its reply brief singles out a statement in the brief of defendant in error to which it takes exception. It objects to the sentence on page 2 of our brief reading: "The car equipment of the Railroad Company was a burden on its hands, it was lying on storage sidings, and coal generally was sluggish in the market." This sentence or state-

ment it contrasts with a later statement at page 6 of our brief that "witness after witness testified that the times were normal as to demand for coal", and with certain testimony of Mr. McCormick, abstracted in its reply brief and to be found at page 38, Transcript of Record, to the effect that ordinary business conditions prevailed during the period of the action.

Plaintiff in error need but have read the sentences in the brief of defendant in error immediately preceding and following the sentences criticised to have seen that the whole thought on the point was expressed as follows:—

> "The trade and transportation conditions of the bituminous coal business were average, normal and ordinary. The car equipment of the railroad company was a burden on its hands, was lying in storage sidings, and coal generally was sluggish in the market. By reason of its superiority the Coal Company's coal was always in demand."

On pages 33 and 34 of the brief of defendant in error appear excerpts from the testimony and from the offer made by the railroad company at the trial of the cause, which we submit amply justify the statements at pages 12 and 40 of the Coal Company's brief criticised on page 2 of the Railroad Company's reply brief.

Neither are those averments in the least at variance with that part of the Coal Company's Statement of Claim quoted *in extenso* at page 3 of the Railroad Company's reply brief. The paragraph of said plaintiff's statement there set out charges the Railroad Company with failure to "*provide* coal cars adequate and sufficient to meet the ordinary demands of its patrons". This is absolutely consistent with the Coal Company's position throughout, with what the jury said it had abundantly proved, viz., that the Railroad Company *had* plenty of transportation facilities, but failed, for reasons best known to itself, to *provide or furnish* them to patrons, of whom the Coal

Company plaintiff in this case was one.

Moreover, it is quite consistent with the proposition which we have contended throughout was proved to a demonstration, that certain operators and they alone could get cars in abundance, and that the carrier undertook to regulate the market by making cars artificially short.

The testimony and the argument of counsel for the Railroad Company—counsel here representing the carrier took no part in the trial—so impressed this position of the Railroad Company upon the Court, that in his charge to the jury he made reference thereto in the following language which we reproduce although most of it is in our main brief:—

> "As we look at the matter, a person, a firm or a corporation has a right under the law to buy or lease a coal property along the line of a railroad, to open up that property for shipping coal, to provide an equipment according to the acreage and output intended to be shipped, and has then a right to demand from the common carrier the necessary facilities to carry on the business according to the requirements of that mine. He has a right to take his chances in the market along with everybody else, and *it is not the business of the common carrier to try to regulate and control the output of coal so that the market for coal can be controlled in either quantity or price. For this reason* we, therefore, refused to allow the defendant to prove that the very customers which plaintiff alleges he lost by reason of the irregular and insufficient car supply were in fact supplied by some one else on the Pennsylvania lines." (Transcript of Record, page 94.)

This instruction of the Court was assigned for error by the Railroad Company, Assignment of Error No. 6, page 94, Transcript of Record, in the Supreme Court of Pennsylvania, and as all assignments were overruled, we

think the matter, now complained of in the reply brief of the plaintiff in error, is to be regarded as an established fact. Had the record in this case not justified the trial Court, the assignment of error would have been sustained.

In plaintiff in error's reply brief an attempt is also made to minimize the effect of the testimony of the carrier's own witnesses as to the surplus of coal cars, and to confine it to a particular day. In doing this the plaintiff in error puts quite out of view the offer in connection with which the testimony was adduced, to be found at page 106, Transcript of Record, reproduced at page 34 of our main brief. The central thought of the carrier was to show that there was a vast number of cars with which to equip shippers; and to emphasize this adequacy it proposed to show that cars stood on its tracks unused. Now to endeavor to interpret the testimony, apart from that relating to the 900 cars of April 28th, 1904, as referring to a particular day or days and to limit its purport to a very restricted period is inharmonious with the very purpose of its introducton and utterly unwarranted by the general record and by ordinary rules of construction. Indeed, if plaintiff in error wished to be frank and fair it would admit what came to light in another of the group of coal company cases, (Bulah Coal Company's case), from the mouth of its own witness, Trump, that for a stretch of six months at a time, during the very period of this action, its unused bituminous coal car equipment was stored along its tracks.

The Railroad Company's table at page 85, Transcript of Record, but begs the whole question. Apart from all other considerations it assumes both a right and a necessity to make a pro rata allotment during a period of normal trade and transportation conditions, and it bases its pro rating, as appears by the cross-examination of the witnesses, upon a system condemned by the Interstate Commerce Commission and this Court.

In our main brief we have treated sufficiently of the motives and the methods that brought about the use of

the Berwind and the Keystone cars at the Sonman mine Nothing brought forth in the "Reply Brief" requires further reference to this feature.

At page four of the plaintiff in error's reply brief, we find an extract from a letter of the Railroad Company's General Superintendent of Transportation. Comment thereupon we regard as superfluous, as the writer of the brief has not seen fit to indicate in what connection the the letter is used, when written, or where it may be found in its entirety.

The plaintiff's case discloses the following indisputable facts:—

(1) That the plaintiff below had a large and productive coal mine, amply equipped to produce a large tonnage, located on the line of railroad of defendant below, with a market for the productive capacity of the mine.

(2) That during the period of the action it consistently and persistently demanded from the Railroad Company for the shipment of its coal, cars substantially to the rating of its mine.

(3) That the Railroad Company had an adequate supply of cars during the period of the action sufficient to furnish the plaintiff below with the cars it ordered; this not only being a matter in effect admitted by the carrier in its proofs, but found as a fact by the jury upon submission of the question to it by the trial Court in his charge. (Transcript of Record, page 95).

(4) That the defendant below consistently and persistently refused and neglected to furnish the cars so ordered, a fact amply shown by the Coal Company and the records of the Railroad Company as well, and neither denied nor excused by the carrier.

(5) That the cars ordered by the Coal Company were requisitioned without regard to destination.

(6) That by the refusal of the Railroad Company to furnish cars ordered the plaintiff below sustained damages in the sum of $145,830.25, as found by the jury.

"B"

As the defendant in error views this case the only question that can arise in this Court upon the established facts of the cause is whether the State Court had jurisdiction to redress the wrong suffered. All the assignments of error with the exception of the ninth in whole or in part go to the question of jurisdiction, and the ninth is not unrelated thereto.

Plaintiff in error's contention at the trial and in the State Supreme Court was that because a portion of the traffic would have been interstate and because it was an interstate carrier, a Federal Tribunal, either the Interstate Commerce Commission or a Federal Court (and the Railroad Company was very particular not to designate which) had exclusive jurisdiction of the controversy.

Defendant in error contended and still contends that it is not seeking to recover by force and effect of any Federal statute or Federal Law, but by force and effect of the Common Law of Pennsylvania, which at all times heretofore had declared the right and provided the remedy sought by it.

It will be observed that nowhere in the record is there proof or offer of proof on behalf of the Railroad Company that it observed any rule laid down by Act of Congress or by ruling of the Interstate Commerce Commission, in its delivery of coal cars to the Company.

The case, therefore, resolves itself into one of arbitrary wrong on the part of the plaintiff in error, a wrong that was equally flagrant, both before and since the passage of the Act to Regulate Commerce, that is independent of that Act and in nowise inconsistent therewith, and the remedy now invoked was always available in the State Courts, we contend.

Did, then, the plaintiff Coal Company have the remedy invoked prior to any legislation by Congress on

the subject of Interstate Commerce? Both State and Federal tribunals have answered in the affirmative, and they have said that by the 22nd Section of the Interstate Commerce Act the remedy is expressly preserved.

As this Court said in

Pennsylvania Railroad Company vs. Puritan Coal Mining Company,
237 U. S., 121,

> "Such suits, (there referring to rule violation), though against an interstate carrier for damages arising in interstate commerce, may by prosecuted either in the State or Federal Courts."

To the same effect is the pronouncement of this Court in

Pennsylvania Railroad Company vs. Clark Brothers Coal Mining Company, U. S. Adv. Ops., 1914, page 896-902,

where it said that

> "so long as the creative provisions of the Federal Act did not appear to be involved, and the wrong was not disclosed in the aspect presented by the Commission's finding, the plaintiff was free to avail itself of common-law remedies or of those afforded by local statutes."

And as showing that the instant case is on all fours with the Puritan case, supra, we have the following extract from the latter:

> "It makes little difference what name is given the cause of action sued on in the present case; or whether it is treated as a *suit for a breach of the carrier's law duty to furnish cars*, or an action for damages for the carrier's unjust discrimination." ****In either case the liability is the same.* For where the carrier performs its duty to A and at the same time fails to perform its duty to B, there has been in a sense a discrimination against B. In those instances neither the cause of action, nor the juisdiction of the Court is defeated because the breach of duty is also called a discrimination."

Illinois Central Railroad Co. vs. Mulberry Hill Coal Co.,
U. S. Adv. Op., 1914, page 760, 763,

is also on all fours with the case at bar, the only distinction being that failure to perform a common-law duty is the gist of the action in the Sonman case, whereas in the Mulberry Hill case the failure was in the non-performance of a statutory requirement declaratory of the common-law duty.

And what this Court there said, we respectfully submit, is peculiarly pertinent here to wit:

> "There is nothing in the amendments introduced by that Act (Hepburn Act of 1906) to affect the jurisdiction of the State Court in an action such as the present."

In our main brief we have at some length elaborated the thought that the Hepburn amendment does not in the least deprive the State Courts of jurisdiction in such cases as the one at bar.

Even if the Hepburn Act were purely creative in its scope, instead of declarative of the common-law, there is no issue made by the pleadings of the Railroad Company that the requests made by the Coal Company for transportation facilities were anything but reasonable. Neither is there anything in the record to show that at any time the Pennsylvania Railroad Company advised the Coal Company that its requests for cars were unreasonable; that an exceptional movement of cars off its lines caused a shortage that created the deficiency in its supply; that there was any unusual or unexpected call for cars. On the contrary, the record shows just the reverse. For example, at page 35, Transcript of Record, we find the following reply from the Railroad Company to a complaint by the Coal Company as to car supply:—

"PENNSYLVANIA RAILROAD COMPANY,
Pennsylvania Railroad Division
Office of General Superintendent.
G. W. Creighton.
Altoona, Pa., February 3, 1904.

Mr. Vance McCormick, Treasurer. Sonman Shaft Coal Co., Harrisburg, Penna.,

Acknowledging your favor, February 1, relative to the distribution of cars. It is true that the number delivered to your operations during the month of January was a little short of their proportion. We have arranged to make up this shortage, at the earliest moment.

G. W. Creighton,
General Superintendent."

In this respect the Sonman case closely resembles Eastern Railway Co. vs. Littlefield, 237 U. S., 140, decided the same day as the Puritan case.

The Sonman case is even stronger, for in the Littlefield case, the carrier in its answer set up the defense that the coal company's demand for cars was unreasonable, that an unprecedented rush of settlers created an unprecedented demand for transportation facilities, that there was a car shortage throughout the country and to have complied with plaintiff's demands would have brought about discrimination against others.

What was said by this Court in the Littlefield case, supra, applies here as well, to wit:

"That liability (the carrier's) cannot now be avoided by proof that the failure to furnish cars was occasioned by a shortage for which the carriers may not have been responsible, but as to which they failed to give timely notice to the shipper."

A fortiori, is the Court's observation pertinent here, when it is recalled that at the trial of the Sonman case the carrier showed an abundance of cars available, that in fact it had surplus cars at periods in storage along its line.

The endeavor of the plaintiff in error to make out

that the Hepburn Act precludes the right of recovery in the instant case and its effort to show at the trial that certain cars were off its line, the latter proposition being discussed at page 40 of our main brief, are of a stripe. No such points were ever raised with the Coal Company during the years of its maltreatment, no such excuses were ever offered. The carrier simply did what it chose to do in the way of car supply, arbitrarily and by main force. Neither does any plea, any answer, any motion to dismiss interposed by the carrier by way of defense suggest such propositions. An observation in an opinion of this Court in a railway case

McCarthy vs. Ohio & Mississippi Railroad Co., 96 U. S., 258,

applies here with great force. The railway company there first contended that it failed to forward cattle on Sunday for the want of cars, and then made a question about the illegality of a Sunday shipment. Referring to the latter contention, the Court said:

> "This point was an afterthought suggested by the pressure and exigencies of the case."

In McCarthy vs Railway Co., supra, this Court also effectually disposes of the contention here made by the carrier that the trial Court erred in excluding the offer to show that certain cars were off the carrier's lines in interstate traffic. As appears in our main brief, the carrier had already shown that it possessed an abundance of cars. The inconsistency of the two positions makes applicable the declaration of this Court in the McCarthy case that the litigant,

> "Cannot, after litigation has begun, change his ground, and put his conduct upon another and a different consideration. He is not permitted thus to mend his hold."

But in any event plaintiff in error was not prejudiced in the slightest by the exclusion of its offer to show that *during the entire period of the action* cars were off its lines that, except for such fact, would have been

available for distribution to the Sonman mine among others. The avowed object of this offer was to demonstrate that there was a sufficient car equipment owned by the Pennsylvania Railroad Company. But the trial Court in his instructions to the jury conditioned a recovery by the Coal Company upon five postulates. The fifth of these required the jury to find as a fact "that the conditions of the bituminous coal trade were normal and *that the defendant company had a generally ample car supply for the needs of the coal business in normal times and under normal conditions.*" (Transcript of Record, page 95)

Clearly, the jury found as a fact the very thing that the carrier wished to present in another way, and by cumulative testimony, that the carrier's equipment was ample. The jury having determined that with an ample car equipment on hand, the carrier had unlawfully failed to provide the Coal Company with shipping facilities, what boots it that the admission of the excluded testimony would have enabled the carrier to show that it possessed an even *ampler* car equipment?

We respectfully submit that the judgment should be affirmed.

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